BONIFACE LOBO ROBERT V LOBO & ANOR v. TRIBUNAL PENGURUSAN STRATA, PUTRAJAYA & ORS

FEDERAL COURT, PUTRAJAYA
ROHANA YUSUF PCA
AZAHAR MOHAMED CJ (MALAYA)
ABANG ISKANDAR CJ (SABAH & SARAWAK)
VERNON ONG LAM KIAT FCJ
[CIVIL APPEAL NO: 02(f)-69-08-2018(W)]
3 AUGUST 2020

ADMINISTRATIVE LAW: *Judicial review – Application for – Setting aside decision of Strata Management Tribunal – Whether decision made in breach of rules of natural justice – Whether applicant given fair hearing – Whether accorded fair opportunity to present evidence and arguments – Whether remedies available ex debito justitiae where applicant able to demonstrate error of law – Whether decision of Tribunal correct*

Mr Lobo, the proprietor of a parcel in a strata development known as Silverpark Resort, Fraser's Hill, was elected as the Chairman of the Joint Management Committee ('JMC'), an executive arm of the Joint Management Body ('JMB') of the Resort, which comprised four other elected committee members. Upon resignation of the four committee members, leaving Mr Lobo alone on the JMC, an extraordinary general meeting of the JMB ('EGM') was held on 13 June 2015 and the third to ninth respondents were elected as committee members of the JMC. Mr Lobo took the position that the EGM was unlawful and invalid. On 9 July 2015, the new JMC, comprising the third to ninth respondents, filed an action at the High Court ('OS 1047') against Mr Lobo for declarations that (i) the resolutions and actions taken by the JMC during the period that its composition was below the statutory minimum were invalid and unlawful; and (ii) the JMC elected at the EGM was lawfully and validly elected. The High Court granted several declaratory orders, which was however, reversed by the Court of Appeal and the leave to appeal to the Federal Court was refused. On 14 July 2015, Mr Lobo filed a claim at the Strata Management Tribunal ('Tribunal') established under the Strata Management Act 2013 ('SMA') against the third to tenth respondents seeking relief, amongst others, that the EGM, where the JMC was elected, was invalid. The proceedings before the Tribunal, presided by the second respondent ('President'), commenced on 11 January 2016 but was adjourned and resumed on 14 January 2016. The proceeding was adjourned after Mr Lobo applied to recuse the President on the grounds that the President had made adverse remarks against him and did not give him an opportunity to make his reply submission. The President dismissed the recusal application and dismissed Mr Lobo's claim ('award'). Mr Lobo's

application under Form 14 for an interlocutory order was also dismissed. Dissatisfied, Mr Lobo and the JMB applied for a judicial review to set aside the award on the grounds that the Tribunal had breached the rules of natural justice in hearing and determining their claim. The High Court dismissed the application and the subsequent appeal to the Court of Appeal was also dismissed. Hence, the court allowed leave to appeal on the following questions of law: (i) whether the rule in *Sangram Singh v. Election Tribunal* ('*Sangram*'s case') (applied in *Hoh Kiang Ngan v. Mahkamah Perusahaan*), namely, that an error of law by a public decision-maker does not warrant intervention by judicial review in the absence of substantial injustice, extended to a case where the said public decision-maker acted in breach of natural justice; and (ii) where judicial review was declined based upon the decision of the High Court in a connected matter which decision was reversed on appeal, was the applicant seeking judicial review entitled to judgment in his favour *ex debito justitiae*.

Held (dismissing appeal with costs)
Per Vernon Ong Lam Kiat FCJ delivering the judgment of the court:

(1) The notion of natural justice is rooted in the right to a fair hearing, and in particular, to the right to be heard and to be given a fair opportunity to present evidence and argument before a tribunal makes its decision. Leave question (i) was posited on the premise that the Tribunal had acted in breach of natural justice. The leave question became academic as there was no factual premise upon which the leave question may be founded. In the courts below, the issue posited in leave question (i) was never raised nor was *Sangram*'s case mentioned, considered or applied. The question was also academic because *Sangram*'s case itself was a case of breach of natural justice. The court thus declined to answer leave question (i). (para 29)

(2) The trial judge took into account the decision of OS 1047 in deciding (i) whether the President had delivered its decision without hearing or considering the merits of the substantive claim; and (ii) if the President had committed an error of law, whether the merits of the case would lie in refusing the order of *certiorari*. The trial judge had also considered the other grounds set out in the affidavit evidence and had given detailed and comprehensive grounds for arriving at his findings that there was no breach of natural justice and/or procedural impropriety by the President in the decision-making process. (para 30)

(3) Remedies under a judicial review application are discretionary and are not available *ex debito justitiae* to an applicant who is able to demonstrate an error of law on the part of a public decision-maker. Mr Lobo was given every reasonable opportunity to present his case orally and/or in writing in the proceedings before the Tribunal came to its decision.

There was no evidence to support the allegation that the appellants had been deprived of their right to a fair hearing. The trial judge considered the totality of the evidence on the record and correctly found that there was no breach of natural justice or procedural impropriety. Even though the trial judge may have erred in considering the decision in OS 1047, in the circumstances of this case, the ultimate decision was correct, so no injustice of any sort has ensued, whether substantial or otherwise. Hence, the appellants seeking judicial review were not entitled to judgment in their favour *ex debito justitiae*. Consequently, leave question (ii) was answered in the negative. (paras 24, 31 & 32)

Bahasa Melayu *Headnotes*

Encik Lobo, pemilik satu bahagian petak dalam pembangunan strata dikenali sebagai Silverpark Resort, Bukit Fraser, dipilih sebagai Pengerusi Jawatankuasa Pengurusan Bersama ('JMC'), cabang eksekutif Badan Pengurusan Bersama ('JMB') Resort tersebut, yang terdiri daripada empat ahli jawatankuasa lain yang dipilih. Selepas peletakan jawatan empat ahli jawatankuasa, meninggalkan hanya Encik Lobo dalam JMC, satu mesyuarat agung luar biasa JMB ('EGM') diadakan pada 13 Jun 2015 dan responden-responden ketiga hingga kesembilan dilantik sebagai ahli-ahli jawatankuasa JMC. Encik Lobo mengambil kedudukan bahawa EGM tersebut tidak sah. Pada 9 Julai 2015, JMC baharu, yang terdiri daripada responden ketiga hingga kesembilan, memfailkan tindakan di Mahkamah Tinggi ('OS 1047') terhadap Encik Lobo untuk deklarasi-deklarasi bahawa (i) resolusi-resolusi dan tindakan-tindakan yang diambil JMC semasa komposisinya kurang daripada jumlah minimum statutori tidak sah dan bertentangan dengan undang-undang; dan (ii) JMC yang dipilih dalam EGM adalah sah. Mahkamah Tinggi membenarkan beberapa perintah deklarasi, yang walau bagaimanapun, diakas oleh Mahkamah Rayuan dan kebenaran merayu ke Mahkamah Persekutuan ditolak. Pada 14 Julai 2015, Encik Lobo memfailkan tuntutan di Tribunal Pengurusan Strata ('Tribunal') yang ditubuhkan bawah Akta Pengurusan Strata 2013 ('Akta') terhadap responden ketiga hingga kesepuluh memohon relief, antara lain, bahawa EGM, yang melaluinya JMC dilantik, tidak sah. Prosiding di hadapan Tribunal, dipengerusikan oleh responden kedua ('Presiden'), bermula pada 11 Januari 2016 tetapi ditangguhkan dan disambung semula pada 14 Januari 2016. Prosiding tersebut ditangguhkan selepas Encik Lobo memohon Presiden menarik diri atas alasan bahawa Presiden membuat kenyataan buruk terhadapnya dan tidak memberi kepadanya peluang untuk membuat hujahan balas. Presiden menolak permohonan tarik diri dan menolak tuntutan Encik Lobo ('award'). Permohonan Encik Lobo bawah Borang 14 untuk perintah interlokutori juga ditolak. Tidak berpuas hati, Encik Lobo dan JMB memohon semakan kehakiman untuk mengetepikan award atas alasan-alasan bahawa Tribunal melanggar kaedah-kaedah keadilan asasi semasa mendengar

dan memutuskan tuntutan mereka. Mahkamah Tinggi menolak permohonan tersebut dan rayuan ke Mahkamah Rayuan juga ditolak. Oleh itu, mahkamah memberi kebenaran merayu atas soalan undang-undang berikut: (i) sama ada kaedah dalam *Sangram Singh v. Election Tribunal* ('kes *Sangram*') (diguna pakai dalam *Hoh Kiang Ngan v. Mahkamah Perusahaan*), iaitu, bahawa kekhilafan undang-undang oleh pembuat keputusan awam tidak mewajarkan campur tangan semakan kehakiman apabila tiada ketidakadilan substansial, dilanjutkan pada kes di mana pembuat keputusan awam bertindak melanggar keadilan asasi; dan (ii) apabila semakan kehakiman ditolak berdasarkan keputusan Mahkamah Tinggi dalam perkara yang berkaitan keputusan diakas atas rayuan, adakah pemohon yang memohon semakan kehakiman berhak mendapat penghakiman berpihak padanya *ex debito justitiae*.

Diputuskan (menolak rayuan dengan kos)

Oleh Vernon Ong Lam Kiat HMP menyampaikan penghakiman mahkamah:

(1) Tanggapan keadilan asasi adalah berasaskan pada hak untuk perbicaraan adil, khususnya, hak untuk didengar dan diberi peluang saksama untuk mengemukakan keterangan dan hujahan sebelum Tribunal membuat keputusannya. Soalan kebenaran (i) dikemukakan atas dasar bahawa Tribunal bertindak melanggar keadilan asasi. Soalan kebenaran itu menjadi akademik kerana tiada asas fakta yang boleh disandarkan untuk soalan kebenaran itu. Di mahkamah di bawah, isu dalam soalan kebenaran (i) tidak pernah dibangkitkan atau kes *Sangram* dinyatakan, dipertimbangkan atau digunakan. Soalan itu juga adalah akademik kerana kes *Sangram* itu sendiri adalah kes pelanggaran keadilan asasi. Mahkamah, oleh itu, enggan menjawab soalan kebenaran (i).

(2) Hakim bicara mengambil kira keputusan dalam OS 1047 untuk memutuskan (i) sama ada Presiden telah membuat keputusan tanpa mendengar atau mempertimbangkan merit tuntutan substantif; dan (ii) jika Presiden telah melakukan kekhilafan undang-undang, sama ada merit kes terletak dalam penolakan perintah *certiorari*. Hakim bicara juga telah mempertimbangkan alasan-alasan lain yang dikemukakan dalam keterangan afidavit dan telah memberi alasan-alasan terperinci dan menyeluruh untuk dapatan-dapatan bahawa tiada pelanggaran keadilan asasi dan salah laku prosedur oleh Presiden dalam proses membuat keputusan.

(3) Remedi bersifat budi bicara dan bukan sedia ada *ex debito justitiae* pada pemohon yang boleh menunjukkan kekhilafan undang-undang oleh pembuat keputusan awam. Encik Lobo telah diberi setiap peluang untuk mengemukakan kesnya secara lisan dan/atau bertulis dalam prosiding sebelum Tribunal membuat keputusan. Tiada keterangan menyokong dakwaan bahawa perayu-perayu dinafikan hak untuk perbicaraan adil.

Hakim bicara mempertimbangkan keseluruhan keterangan atas rekod dan, dengan betul, membuat dapatan bahawa tiada pelanggaran keadilan asasi atau salah laku prosedur. Walaupun hakim bicara mungkin khilaf apabila mempertimbangkan keputusan OS 1047, dalam keadaan kes ini, keputusan akhir adalah betul, dengan itu, tiada apa-apa ketidakadilan berlaku, sama ada substansial atau sebaliknya. Oleh itu, perayu-perayu yang memohon semakan kehakiman tidak berhak untuk penghakiman berpihak pada mereka *ex debito justitiae*. Dengan itu, soalan kebenaran (ii) dijawab secara negatif.

Case(s) referred to:
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Fletcher Construction Australia v. Lines Macfarlane & Marshall [2001] 4 VR 28 ***(refd)***
Hardmor Productions Ltd & Ors v. Hamilton & Ors [1982] 1 All ER 1042 ***(refd)***
Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687 FC ***(refd)***
J v. Lieschke (1987) 162 CLR 447 ***(refd)***
Kewal Krishnan v. Minister of Local Bodies & Ors, AIR 1959 J&K 17 ***(refd)***
Lam Eng Rubber Factory (M) Sdn Bhd v. Tribunal Rayuan Lembaga Getah Malaysia; Safic Alcan (Malaysia) Sdn Bhd (Intervener) [2003] 3 CLJ 598 HC ***(refd)***
Ngu Toh Tung & Ors v. Superintendent of Lands & Survey, Kuching Division, Kuching & Anor [2006] 1 CLJ 30 CA ***(refd)***
Sangram Singh v. Election Tribunal [1955] 2 SCR 1 ***(refd)***
Stratford v. Ministry of Transport [1992] 1 NZLR 486 ***(refd)***
Subramanian Sannasy v. SAC II Syed Alwi Syed Hamid & Anor [2004] 1 LNS 325 HC ***(refd)***
Tan Heng Chew & Ors v. Tan Kim Hor & Ors [2006] 3 CLJ 481 FC ***(refd)***
Tay Beng Chuan v. Official Receiver And Liquidator, Kie Hock Shipping (1971) Pte Ltd [1987] 1 LNS 44 CA ***(refd)***
Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor [2012] 1 CLJ 448 FC ***(refd)***
Zermalt Holdings SA v. Nu-Life [1985] 2 EGLR 14 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 78
Industrial Relations Act 1967, s. 2

Other source(s) referred to:
Tapash Gan Choudhury, *Penumbra of Natural Justice*, 3rd edn, pp 222-223

For the appellants - Gopal Sri Ram, Yasmeen Soh, Raveena Kaur & Khalis Isma-Alif; M/s Chooi, Saw & Lim
For the respondents - Wong Chong Wah, Wong Chun-Keat, Chan Pei Mun; M/s Wong & Wong

[Editor's note: For the Court of Appeal judgment, please see Boniface Lobo Robert V Lobo & Anor v. Tribunal Pengurusan Strata, Putrajaya & Ors [2019] 1 LNS 680 (affirmed).]

Reported by S Barathi

JUDGMENT

Vernon Ong Lam Kiat FCJ:

Introduction

[1] As Justice Tan Sri Idrus Harun has since left the Bench and is presently the Attorney General of Malaysia, this judgment is being handed down pursuant to s. 78 of the Courts of Judicature Act 1964. This is the unanimous decision of the four remaining judges of this court. The appeal before us relates to the following questions of law for which leave was granted on 6 August 2018.

> Question 1
>
> Whether the rule in *Sangram Singh v. Election Tribunal* [1955] 2 SCR 1 (applied in *Hoh Kiang Ngan v. Mahkamah Perusahaan* [1996] 4 CLJ 687; [1995] 3 MLJ 369), namely, that an error of law by a public decision maker does not warrant intervention by judicial review in the absence of substantial injustice, extends to a case where the said public decision maker acts in breach of natural justice?
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> Question 2
>
> Where judicial review is declined based upon the decision of the High Court in a connected matter which decision is reversed on appeal, is the applicant seeking judicial review entitled to judgment in his favour *ex debito justitiae*?

Salient Facts

[2] The background facts which led to the granting of leave to appeal to the Federal Court on the two questions of law are as follows.

[3] The first appellant (Mr Lobo) brought an action in the High Court for judicial review to quash a decision of the Strata Management Tribunal established under the Strata Management Act 2013 (SMA 2013) on the grounds that the Tribunal had breached the rules of natural justice in hearing and determining the appellant's claim.

[4] Mr Lobo is a proprietor of a parcel in a strata development known as Silverpark Resort, Fraser Hill ('the Resort'). In October 2014, Mr Lobo was elected as chairman of the Joint Management Committee (JMC) which comprised four other elected committee members. The JMC is the executive arm of the Joint Management Body (JMB) of the Resort.

[5] By November 2014, three of the four committee members had resigned. Three other proprietors were subsequently appointed to replace those who had resigned. However, in May 2015 all the four committee members resigned leaving Mr Lobo alone on the JMC.

[6] At an extraordinary general meeting of the JMB on 13 June 2015 ('the EGM') the third to ninth respondents were elected as committee members of the JMC. Mr Lobo took the position that the EGM was unlawful and invalid.

[7] At the end of June 2015, a legal firm purporting to act for the JMB demanded from the tenth respondent ('the building manager') that he deliver up the assets, books and records of the JMB. Mr Lobo also wrote to the building manager informing that his employment with the JMB had ceased with effect from 1 June 2015.

[8] On 9 July 2015, the new JMC (comprising the third to ninth respondents) filed an action at the High Court (OS 1047) against Mr Lobo for declarations that (i) the resolutions and actions taken by the JMC during the period that its composition was below the statutory minimum were invalid and unlawful, and (ii) the JMC elected at the EGM was lawfully and validly elected.

[9] On 14 July 2015, Mr Lobo filed a claim under the SMA 2013 in the Strata Management Tribunal (the first respondent) (the Tribunal) against the third to tenth respondents seeking relief, amongst others, that the EGM where the JMC was elected was invalid. The Tribunal hearing was scheduled to commence on 11 January 2016.

[10] The hearing of OS 1047 proceeded and on 30 December 2015 the High Court granted several declaratory orders which *inter alia*, included the declarations sought (see items (i) and (ii) of para [8] above). The High Court's order was reversed by the Court of Appeal on 22 January 2018; leave to appeal to the Federal Court was refused.

[11] On 11 January 2016, the proceedings commenced before the Tribunal presided by the second respondent ('the President') where Mr Lobo argued his claim. However, the proceedings in the Tribunal was adjourned as Mr Lobo applied for an interlocutory order in Form 14 of the SMA 2013 to cancel the notice of the eighth AGM of the JMB scheduled on 23 January 2016; which AGM notice was issued on 11 January 2016 by the third to tenth respondents.

[12] The Tribunal proceedings resumed on 14 January 2016 at which the respondents argued their case. The proceedings were adjourned after Mr Lobo applied to recuse the President on grounds that the President had made adverse remarks against him and did not give him an opportunity to make his reply submission. Mr Lobo then affirmed a statutory declaration on 2 February 2016 which recounted his version of events at the second hearing date on 14 January 2016 – in particular, to the alleged adverse remarks made by the President against him. A copy of the SD was submitted to the Tribunal on 3 February 2016, which was the date fixed for decision.

[13] On 3 February 2016, the President dismissed the recusal application and dismissed Mr Lobo's claim ('the Tribunal's award'). The President also dismissed Mr Lobo's application under Form 14 for an interlocutory order. Dissatisfied with the Tribunal's award, Mr Lobo and the JMB (jointly referred to as the appellants) applied to the High Court for a judicial review to set aside Tribunal's award on the grounds that the Tribunal had breached the rules of natural justice in hearing and determining their claim.

High Court's Findings

[14] After hearing of parties, the High Court dismissed the appellants' application for judicial review with costs. The grounds of the High Court's decision on the following key issues may be summarised as follows:

(i) Whether the Tribunal delivered its decision without hearing or considering the merits of the substantive claim?

(a) The Tribunal had in fact heard the submissions of parties on the substantive claim;

(b) The Tribunal was correct to have regarded the issue of the legality of the EGM as having been determined by the High Court in OS 1047 commenced by the respondents;

(c) The Tribunal had in fact made a determination on the merits in relation to the issues of whether the building manager had unlawfully retained the assets, books and records of the JMB, and whether his employment had terminated by operation of law as a result of the coming into force of the SMA 2013.

(ii) Whether the Tribunal delivered its decision without allowing Mr Lobo to begin his oral submissions?

(a) On the facts of the case, Mr Lobo had been given the opportunity to respond orally to the respondent's arguments;

(b) Even if Mr Lobo had been prevented from providing an oral response to the respondents' arguments, he had in fact been given the opportunity to provide written submission.

(iii) Whether the Tribunal delivered its decision on the interlocutory application in Form 14 without hearing or considering the merits of the application?

(a) The Tribunal had in fact heard the merits of the interlocutory application because Mr Lobo had dealt with the issue in his written submission of 13 January 2015;

(b) The Tribunal was entirely correct to have dismissed the interlocutory application on the basis that it did not have the jurisdiction to grant the order sought.

(iv) Whether the Tribunal breached the rules of natural justice when it did not inform Mr Lobo on the law relied upon it in deciding on the recusal application?

(a) There was no obligation placed on the Tribunal to provide to Mr Lobo the authorities upon which it sought to rely before it made a decision on the recusal application.

(v) Whether the Tribunal lacked impartiality or acted in bad faith in relation to any for the instances set out in the preceding paras (i) to (iv)?

(a) There is no rule of general application that prohibits a judge or other tribunal from hearing an application for his own recusal;

(b) The question that the Tribunal lacked impartiality or had acted in bad faith was unproven;

(c) Even if the High Court were to hold that there had been a reviewable error committed by the Tribunal, the Tribunal had in fact come to the right decision on the merits of the case, and the justice of the case lies in refusing the order of *certiorari*;

(d) *Certiorari* and *mandamus* cannot be granted because the appellants' prayers for relief in the original action before the Tribunal are inconsistent with the findings of the High Court in OS 1047.

Court Of Appeal's Decision

[15] Mr Lobo and the JMB's appeal to the Court of Appeal was mounted on two main planks: (i) the High Court erred in holding that there was no breach of the rules of natural justice during the proceedings before the Tribunal; and (ii) the High Court erred in holding that in the event that there may have been procedural impropriety in the decision-making process, the reviewing court could exercise its judicial discretion to refuse the remedy.

[16] The appeal was dismissed with costs and the decision of the High Court affirmed. The findings of the Court of Appeal may be summarised as follows.

Whether There Was A Breach Of The Rules Of Natural Justice?

[17] The appellants' contention was that the President, as a decision-maker, had breached the rules of natural justice when he failed to give reasons in dismissing the recusal application. As such, Mr Lobo had been deprived of his right to submit when the President failed to furnish legal authorities relied upon as the basis of the decision not to recuse himself. The Court of Appeal took the view that the law and judicial practice do not impose upon the court and/or tribunal the requirement to give his or her comprehensive and detailed reasons immediately at the time the decision was pronounced (*Stratford v. Ministry of Transport* [1992] 1 NZLR 486, 488-489). Although the preferable course was for the President to deliver his reasons

on the same occasion when the ruling was made but there was no absolute rule prohibiting a delay in delivering the reasons (*Fletcher Construction Australia v. Lines Macfarlane & Marshall* [2001] 4 VR 28; [2001] VSCA 167). As such, the Court of Appeal opined that the failure of the President to give his reasons immediately would not constitute an error or breach of the rules of natural justice.

[18] Mr Lobo also alleged bias and bad faith in connection with the events leading up to the recusal application at the hearing on 14 January 2016. The Court of Appeal after carefully perusing the notes of proceedings, Mr Lobo's SD and the Tribunal award found that there were some indications that the President "spoke heatedly and impatiently" when Mr Lobo made a warranted suggestion in his submission. The Court of Appeal concluded that the comments made by the President must be looked at in the proper context – to keep a tight rein on proceedings of the Tribunal. Whilst the President should have displayed a more judicial temperament, it cannot be said that his outbursts prejudicially affected the case because his criticism was with regards to the manner in which Mr Lobo conducted his case and not the merits of the case itself. As such, Mr Lobo was not deprived of a fair hearing (*Hardmor Productions Ltd & Ors v. Hamilton & Ors* [1982] 1 All ER 1042 distinguished on the facts).

Ex Debito Justitiae – Whether The High Court Erred In Holding That If Procedural Impropriety Had Been Occasioned, The Court Still Has The Discretion To Refuse The Remedy Sought?

[19] The Court of Appeal opined that prerogative relied in the form of *certiorari* is discretionary and is not available *ex debito justitiae* to an applicant who is able to demonstrate an error of law on the part of a decision-maker (*Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687). Further, in the circumstances of this case, the ultimate decision being correct, no injustice or any sort, whether substantial or inconsequential, has been occasioned because of the alleged wrong reasons.

Submissions Of Counsel

[20] On leave question 1, learned counsel for the appellants argued that the proceedings before the Tribunal were tainted with procedural unfairness. The President did not give any reason for refusing to recuse himself from hearing the proceedings. Though he said that he had consulted authorities but none of these authorities were put to the appellants. This amounted to a failure of natural justice (Bingham J in *Zermalt Holdings SA v. Nu-Life* [1985] 2 EGLR 14; *Hardmor Productions* (*supra*); *Penumbra of Natural Justice* by Tapash Gan Choudhury, 3rd edn, pp. 222-223). Mr Lobo's request for an oral argument was also denied. In the peculiar circumstances of this case, this is a violation of natural justice; coupled with the fact that the President has made adverse remarks personally against Mr Lobo during argument (*Yusof*

Suden v. Suruhanjaya Perkhidmatan Polis [2012] 1 CLJ 448; [2011] 5 MLJ 465; *Sangram Singh v. Election Tribunal* [1955] 2 SCR 1). The right to be heard is not subject to the discretion of an adjudicator (*J v. Lieschke* (1987) 162 CLR 447). A

[21] On leave question 2, learned counsel argued the learned judge in refusing the judicial review application had relied on the judgment that was reversed by the Court of Appeal on 22 January 2018 and in respect of which leave was declined. As such, the learned judge's decision cannot stand and the Court of Appeal should have intervened and allowed the appeal. B

[22] In reply, learned counsel for the respondents argued that the questions for which leave was granted are not matters that arose or were decided by the High Court in the exercise of its original jurisdiction and or by the Court of Appeal. The appellants' case in the High Court and in the Court of Appeal was that: C

(i) the President had committed procedural impropriety and/or breached the rules of natural justice in the decision-making process in making the award; D

(ii) the principles in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia* [1996] 4 CLJ 687; [1995] 3 MLJ 369 should not be applied to cases of breach of natural justice or procedural impropriety; and E

(iii) the award dated 3 February 2016 should therefore be quashed.

As such, the appellants have now taken a new stand by seeking to argue new questions of law which were never raised in the courts below; the Federal Court should therefore decline to answer the new questions (*Tan Heng Chew & Ors v. Tan Kim Hor & Ors* [2006] 3 CLJ 481; [2006] 5 MLJ 313, 320-321 (FC)). F

[23] On leave question 1, counsel argued that *Sangram*'s case was never mentioned, considered or applied in the courts below. The appellants' complaint in the courts below were that there were breach of natural justice or procedural impropriety in the decision-making process of the Tribunal. Further, leave question 1 is rendered academic and irrelevant by the findings of fact and conclusions of law by the High Court and confirmed by the Court of Appeal which concluded that (i) there was no breach of natural justice or procedural impropriety occasioned in the decision-making process of the award, (ii) relief for an order of *certiorari* is discretionary and is not available *ex deblito justitiae* to an applicant who is able to demonstrate an error of law on the part of the public decision-maker, and (iii) no injustice of any sort whether substantial or inconsequent, has been occasioned to the appellants. Further, the issue of whether the application of *Sangram*'s case extends to a case of breach of natural justice is academic as *Sangram*'s case itself is a case of breach of natural justice. There is also no prohibition or restriction G H I

imposed by any case law or statute on the application of *Sangram*'s case in cases of breach of natural justice. At any rate, *Sangram*'s case was referred in cases of natural justice (*Subramanian Sannasy v. SAC II Syed Alwi Syed Hamid & Anor* [2004] 1 LNS 325; [2004] 4 MLJ 415; *Lam Eng Rubber Factory (M) Sdn Bhd v. Tribunal Rayuan Lembaga Getah Malaysia; Safic Alcan (Malaysia) Sdn Bhd (Intervener)* [2003] 3 CLJ 598; [2003] 6 MLJ 353).

[24] On leave question 2, learned counsel for the respondents submitted that even though the learned judge had considered the relevance of the OS 1047 decision, the learned judge had also decided to refuse the grant of judicial review independently on other grounds, ie, there was no breach of natural justice and/or procedural impropriety made by the President in granting the award. Since the learned judge's decision can be supported by other valid grounds, judicial review was rightly refused by the learned judge (*Kewal Krishnan v. Minister of Local Bodies & Ors*, AIR 1959 J&K 17). Further, the remedies under a judicial review application are discretionary and not available *ex debito justitiae* to the appellants even if the appellants succeeded in proving error of law (*Hoh Kiang Ngan*, *supra* at pp. 393, 394; *Ngu Toh Tung & Ors v. Superintendent of Lands & Survey, Kuching Division, Kuching & Anor* [2006] 1 CLJ 30; [2006] 1 MLJ 142 (CA)).

[25] Lastly, learned counsel for the respondents submitted that absent any extraordinary circumstance that justify interference, the Federal Court should not interfere with the discretionary decision of the High Court in the conduct of the business in his own court; especially where there is no evidence of any substantial injustice occasioned against the appellants (*Tay Beng Chuan v. Official Receiver And Liquidator, Kie Hock Shipping (1971) Pte Ltd* [1987] 1 LNS 44; [1987] 2 MLJ 419, 422); *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139; [1982] 1 MLJ 83, 84).

Decision

[26] Leave question 1 is premised on the application of the rule in *Sangram*'s case. In that case, an election petition was filed against Sangram for setting aside Sangram's election. The proceedings commenced at Kotah and after some hearings, the Tribunal made an order on 11 December 1952 that the further sittings would be at Udaipur from 16 to 21 March 1953. As 16 March turned out to be a public holiday, on 5 January 1953, the dates were changed to from the 17 March onwards and the parties were duly notified. On 17 March, Sangram did not appear nor did any of the three counsel whom he had engaged; so the Tribunal proceeded *ex parte* after waiting till 1:15pm. The Tribunal examined the petitioner and two witnesses on the 17th, five more witnesses on the 18th and on the 19th the case was adjourned till the 20th. On the 20th one of Sangram's counsel appeared but was not allowed to take any part in the proceedings because the Tribunal said that it was proceeding *ex parte* at that stage. Three more witnesses were then examined. On the following day, Sangram made an application asking that the *ex parte* proceedings be set aside and that he be allowed to cross-examine

those witnesses whose evidence had already been recorded. The Tribunal heard arguments and rejected Sangram's application on the grounds that both Sangram and his counsel had not shown good cause for the non-appearance. Sangram filed a writ petition in the High Court; the only question before the High Court was whether the Tribunal was right in refusing to allow Sangram's counsel to appear and take part in the proceedings on and after 20 March. The High Court rejected the petition on two grounds: (i) the Tribunal was the authority to decide whether the reasons were sufficient or otherwise and the fact that the Tribunal came to the conclusion that the reasons set forth by Sangram's counsel were insufficient cannot be challenged in a petition of this nature, and (ii) on the merits, Sangram's counsel were grossly negligent in not appearing on the date which had been fixed for hearing.

[27] Sangram appealed to the Supreme Court of India. The Indian Supreme Court started on the footing that the law is well settled that *certiorari* will be issued when the court or Tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice. However, the court went on to say at p. 8 of the report that '[t]hat, however, is not to say that the jurisdiction will be exercised whenever there is an error of law. The High Courts do not, and should not, act as courts of appeal under article 226. Their powers are purely discretionary and though no limits can be placed upon that discretion, it must be exercised along recognised lines and not arbitrarily; and one of the limitations imposed by the courts on themselves is that they will not exercise jurisdiction in this class of case unless substantial injustice has ensued, or is likely to ensue. They will not allow themselves to be turned into courts of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense'. It was further observed that though no Legislature can impose limitations on these constitutional powers, it is a sound exercise of discretion bearing in mind the policy of the Legislature that disputes about these special rights have to be decided as speedily as may be. Therefore, writ petitions should not be lightly entertained in this class of case. On the peculiar facts in *Sangram*'s case, the Indian Supreme Court agreed with the Tribunal that no good cause was shown and so Sangram would have no right to be relegated to the position that he would have occupied if he had appeared on 17 March but that he had a right to appear through counsel on 20 March and take part in the proceedings from the stage at which they had then reached. However, the Indian Supreme Court found that the Tribunal did not exercise its discretion because it considered that it had none and thought that until the *ex parte* order was set aside Sangram could not appear either personally or through counsel. Consequently, the Indian Supreme Court quashed the Tribunal's order and directed it to exercise its discretion vested in it by law along the lines it had indicated.

[28] In *Hoh Kiang Ngan*, *supra* Mr Hoh who was serving as the group general manager of a company was dismissed following a domestic enquiry on a charge of misconduct brought against him. Mr Hoh lodged a complaint with the appropriate authority and in due course Mr Hoh's complaint was referred by the Minister to the Industrial Court for adjudication. Before hearing the case on its merits, the Industrial Court dealt with the preliminary issue as to whether Mr Hoh was a 'workman' within the meaning of s. 2 of the Industrial Relations Act 1967. The Industrial Court ruled that Mr Hoh was a workman within the meaning of the IRA 1967 and made an award in his favour. The company then sought an order of prohibition in the High Court to restrain the continued proceedings in the Industrial Court. The application was founded on two grounds - (i) Mr Hoh was not a workman, and (ii) the Industrial Court had failed to make a proper assessment of the evidence and had given wrong reasons for the conclusion it arrived at in the case. The High Court ruled that the Industrial Court had committed an error of law in its ruling and issued a prohibition restraining the Industrial Court from hearing Mr. Hoh's complaints on its merits. The Federal Court allowed Mr Hoh's appeal and set aside the order of prohibition and remitted the case back to the Industrial Court with a direction that Mr Hoh's complaint be heard and determined on its merits.

[29] The notion of natural justice is rooted in the right to a fair hearing, and in particular to the right to be heard and to be given a fair opportunity to present evidence and argument before a tribunal makes its decision. Leave question 1 is posited on the premise that the Tribunal has acted in breach of natural justice. However, on the settled facts, the learned judge had concluded that the Tribunal's decision-making process was not tainted by any breach of natural justice or procedural impropriety. In arriving at his finding, the learned judge found as a fact that the President had heard submissions of parties on the merits of the substantive claims. The President had allowed the appellants to submit their case orally and also gave the appellants the opportunity to respond to the respondents' arguments before making the award. The President had also heard the merits of the interlocutory application because that issue was contained in the appellants' written submission of 13 January 2015. The learned judge also opined that there is no rule of general application that prohibits a judge or other tribunal from hearing an application for its own recusal and that there was no obligation placed on the President to provide the appellants the authorities upon which he sought to rely on before he made a decision on the recusal application. More importantly, the learned judge held that even if the court were to hold that there had been a reviewable error committed by the Tribunal, the Tribunal had in fact come to the right decision on the merits of the case, and hence the justice of the case lies in refusing the order of *certiorari*. These findings that there was no breach of natural justice were affirmed by the Court of Appeal. Accordingly, we are of the view that leave

question 1 is academic as there is no factual premise upon which leave question 1 may be founded. We are also inclined to agree with the arguments of the respondents that in the courts below the issue posited in leave question 1 was never raised nor was *Sangram*'s case mentioned, considered or applied. Leave question 1 is also academic because *Sangram*'s case itself is a case of breach of natural justice. For the foregoing reasons, we decline to answer leave question 1.

[30] In relation to leave question 2, it appears on the record that the learned judge took into account the decision of OS 1047 in deciding (i) whether the President had delivered its decision without hearing or considering the merits of the substantive claim, and (ii) if the President had committed an error of law, whether the merits of the case would lie in refusing the order of *certiorari*. It is, however, also clear from the learned judge's written judgment that apart from the OS 1047 decision, the learned judge had considered the other grounds set out in the affidavit evidence. The learned judge had also given detailed and comprehensive grounds for arriving at his findings that there was no breach of natural justice and/or procedural impropriety by the President in the decision-making process.

[31] At this juncture, we think it is appropriate to allude to what the Federal Court said in *Hoh Kiang Ngan*'s case. The Federal Court re-affirmed the principle that an application for the prerogative writ of prohibition is not an appeal and neither the High Court nor the Federal Court is entitled to review the merits of any decision reached by the Industrial Court. Even if the Industrial Court had given wrong reasons for holding that Mr Hoh was a workman within the IRA 1967, its ultimate decision being correct, prerogative writ whether in the form of *certiorari* or prohibition ought to have been withheld from the company. It was reiterated that the remedies are discretionary and are not available *ex debito justitiae* to an applicant who is able to demonstrate an error of law on the part of a public decision-maker. In effect, what the Federal Court did in *Hoh Kiang Ngan*, *supra* was to reaffirm the rule in *Sangram*'s case.

[32] In the present case, Mr Lobo was given every reasonable opportunity to present his case orally and or in writing in the proceedings before the Tribunal came to its decision. There is no evidence to support the allegation that the appellants have been deprived of their right to a fair hearing. The learned judge considered the totality of the evidence on the record and, in our considered view, correctly found that there was no breach of natural justice or procedural impropriety. Even though the learned judge may have erred in considering the decision in OS 1047, we are bound to say that in the circumstances of this case, the ultimate decision was correct, so no injustice of any sort has ensued, whether substantial or otherwise (*Kewal Krishnan*, *supra*). For the foregoing reasons, we do not think that the appellants seeking judicial review are entitled to judgment in their favour *ex debito justitiae*. Consequently, leave question 2 is answered in the negative.

[33] For the foregoing reasons, the appeal is dismissed with costs. In the particular circumstances of this case, we think that it is appropriate that the costs here and below should be borne solely by the first appellant and we hereby so order.